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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Case No. 44915-3-II

COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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GOLDBERG FAMILY INVESTMENT CORPORATION,  
a Washington corporation,  
Appellant,

v.

WILLIAM D. QUIGG and CAROL QUIGG,  
and the marital community comprised thereof; and  
PATRICK D. QUIGG and KATHLEEN A. QUIGG,  
and the marital community comprised thereof,

Respondents.

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**APPELLANT'S REPLY BRIEF**

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**ORIGINAL**

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## I. SUMMARY

Respondents concede that this matter is governed by the Federal Arbitration Act (9 U.S.C. §§ 1-14) (hereafter “FAA”). As Respondents also concede, the scope of inquiry of a Trial Court considering a Motion to Compel Arbitration under the FAA is quite narrow. Once the existence of a valid arbitration agreement is established, the party seeking to compel arbitration need only show that the subject matter of the dispute falls within the scope of the arbitration agreement. The issue before the Trial Court is not whether the party seeking to compel arbitration is entitled to substantive relief.

The basic problem with the Trial Court’s decision here is that the Trial Court did not limit its inquiry to the scope of the arbitration agreement. Rather, the Trial Court based its decision on matters which are clearly reserved for determination by the Arbitrator under the FAA because the issues involved are “inextricably bound up with the merits of the dispute.” *Dernhardt v. Trailways, Inc.*, 767 F.2d 687 at 690 (10<sup>th</sup> Cir. 1985). The Trial Court could not resolve these issues without litigating the merits of the dispute.

The first of these issues is standing. Respondents argue that Appellant does not have the right to assert claims, in arbitration or otherwise, because the only claims arising from the course of Respondents’ conduct alleged to be actionable are derivative from Grays Harbor Paper LLC (hereafter “LLC”) and, therefore, not assertable by Appellant. Respondents further assert that standing is the threshold issue to be resolved by the Trial Court in determining whether a dispute is subject to

arbitration under the FAA. (*Response Brief at p. 15*). With respect to this assertion, Respondents are simply wrong. The authority construing the FAA is clear that the affirmative defense of lack of standing is an issue for the Arbitrator.

Second, Respondents assert that the issue of whether Respondents can be compelled to arbitrate as non-signatories is an issue for the Trial Court to decide rather than the Arbitrator, characterizing the issue as an issue going to the validity of the arbitration agreement. However, an inquiry into whether a non-signatory can be compelled to arbitrate presupposes a valid arbitration agreement. The issue of whether a non-signatory can be compelled to arbitrate is outside the scope of the Trial Court's analysis under the FAA.

The circumstances under which a non-signatory can be compelled to arbitrate under the FAA are well established:

In *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185 (9th Cir. 1986), we explained that "non-signatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles." *Id.* at 1187-1188. Among these principles are "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel."

*Comer v. Micor, Inc.*, 436 F.3d 1098 at 1101 (9<sup>th</sup> Cir. 2006). Part of the relief sought in Appellant's Dispute Notice (*CP 200-210*) triggering arbitration under the LLC Operating Agreement is specifically a determination that the separate existence of the entities through which Respondents conducted the activities at issue should be ignored on an alter ego/veil piercing theory. (*CP 209*). Resolution of this issue could not be

achieved without litigating the dispute for which arbitration is sought. Therefore, the issue is “inextricably bound up with the merits of the dispute” and a subject matter for determination by the Arbitrator and not the Trial Court.

Respondents’ assertion that Appellant has no claims which are not derivative from LLC is simply wrong. The assertion is contrary to the express language of the Limited Partnership Act (RCW 25.10 Chap.) and the Limited Liability Company Act (RCW 25.15 Chap.), both of which provide standards of liability for members and limited partners to each other, and separately for derivative actions brought by a member or limited partner on behalf of the limited liability company or limited partnership. It is contrary to authority clearing recognizing the existence of claims assertable by members of a limited liability company against other members.

Under long-standing Washington law, a receiver acquires no greater interest in property than that held by the person or entity which is the subject of the receiver’s appointment. *McGill v. Brown*, 72 Wash. 514 at 516, 130 P. 1142 (1913). As a result, Appellant’s claims were not property of the LLC Receivership Estate and the LLC Receivership Court simply lacked any jurisdiction to administer Appellant’s claims. Indeed, the case law holds that, in order for the LLC Receiver to assert an interest in Appellant’s claims, it would have been required to join in this litigation, which the LLC Receiver did not.

## II. DISCUSSION

### A. The Issue of Arbitrability.

In John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557-558, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964), the Court concluded that, in assessing whether a dispute is subject to arbitration, the analysis had to distinguish between procedural issues and substantive issues. Wiley specifically held that procedural questions which grow out of dispute and bear on its final disposition should be left to the arbitrator. Various Courts have explained and amplified on this principal subsequently:

The Court held in Wiley that because procedural questions are often inextricably bound up with the merits of the dispute, they should also be decided by the arbitrator. Secondly, the adjudication of procedural questions by the courts would needlessly delay the resolution of the dispute. Thus the court's role is limited to determining whether the parties submitted the "subject matter" of a particular dispute to arbitration. If so, then any attendant procedural issues are for the arbitrator as well. Id. at 557, 84 S.Ct. at 918.

Dernhardt v. Trailways, Inc., 767 F. 2d 687 at 690 (10<sup>th</sup> Cir. 1985). The standard relied on by Respondents requires the Trial Court to assess whether there is a valid agreement to arbitrate, and whether the agreement encompasses the dispute at issue, citing to Chiron Corp. v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126 (9<sup>th</sup> Cir. 2000).

While Respondents assert that the LLC Operating Agreement provision requiring arbitration cannot be relied on to compel Respondents to arbitrate, that is an issue entirely separate from whether there is a valid agreement, as discussed below. There is no dispute that the LLC Operating

Agreement is valid. The question is, then, whether the “subject matter” of the dispute is encompassed by the arbitration provision.

In this case, the arbitration provision at issue describes the scope of the subject matter with the broadest possible language:

Any controversy, claim or dispute of whatever nature arising between any of the parties under this Agreement, the other Transaction Documents or in connection with the transactions contemplated hereunder, including those arising out of or relating to the breach, termination, enforceability, scope or validity hereof, whether such claim existed prior to or arises on or after the date hereof ..., shall be resolved by mediation or, failing mediation, binding arbitration.

(*CP 129 at § 16.1*). On its face, the provision encompasses virtually every transaction which would be engaged in by LLC including transactions with third parties.

Respondents contend that the issue of Appellant’s standing is a threshold issue to be addressed by the Trial Court. Respondents’ authority for this proposition is a footnote in a 23-year-old decision, *Britton v. Co-Op Banking Group*, 916 F. 2d 1405 at f.n. 9 (9<sup>th</sup> Cir. 1990). The basis for decision in this case, “one who is not a party to a contract has no standing to compel arbitration;” *id.* at 1413, has been rejected by numerous Courts including the 9<sup>th</sup> Circuit. *See, e.g., Comer v. Micor, Inc.*, 436 F. 3d 1098 (9<sup>th</sup> Cir. 2006)(“non-signatories can enforce arbitration agreements;” *id.* at 1101). Where an arbitration provision encompasses transactions or “relationships” outside the agreement, Courts have held that a non-signatory may compel a signatory to arbitrate. *See, e.g., Sherrer v. Green Tree Servicing LLC*, 548 F.3d 379 (5<sup>th</sup> Cir. 2008). A non-signatory may

compel an arbitration under this authority based solely on the language of the arbitration agreement.

More to the point, Courts applying the FAA have characterized standing as a procedural issue for the arbitrator and not, as Respondents contend, a threshold determination to be made by the Trial Court:

[C]ourts have not hesitated to hold that standing is a matter for the arbitrator to resolve, even though (as we note in a moment) arbitrability is usually an issue for the court. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557-558, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 860 F.2d 1420, 1424 (7th Cir.1988) (“Procedural issues, including the standing of a party to the arbitration, ... are for the arbitrator, so long as the subject matter of the dispute is within the arbitration clause.”) (emphasis omitted); *United Steelworkers of Am., AFL-CIO-CLC v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9<sup>th</sup> Cir. 1981).

*Environmental Barrier Co., Inc. v. Slurry Systems, Inc.*, 540 F.3d 598 at 605 (7<sup>th</sup> Cir. 2008). Note – the analysis focuses on whether the subject matter of dispute falls within the scope of the arbitration agreement and not who the parties to the dispute are. If so, the issues are for the arbitrator. In asserting that standing is a threshold issue to be addressed by the Trial Court, Respondents are simply wrong.

Second, Respondents assert arbitration cannot be compelled here because Respondents are not signatories in their individual capacity to the agreements containing the arbitration provisions. While Respondents contend that this is an issue going to the validity of the arbitration agreement, a threshold issue under cases like *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126 (9<sup>th</sup> Cir. 2000), this contention is,

in fact, nonsensical. There is no reason to engage in the inquiry as to whether a non-signatory can be compelled to arbitrate in the absence of an otherwise valid agreement to arbitrate. Whether a non-signatory can be compelled to arbitrate involves a whole different set of issues from the question of whether the arbitration agreement is valid.

There is, in fact, no question that a non-signatory may be compelled to arbitrate under the FAA:

In Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185 (9<sup>th</sup> Cir. 1986), we explained that “non-signatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles.” *Id.* at 1187-1188. Among these principles are “1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.” Thomson-CSF, S.A. v. Am. Arbitration Ass’n, 64 F.3d 773, 776 (2<sup>d</sup> Cir. 1995).

Comer v. Micor, Inc., 436 F. 3d 1098 (9<sup>th</sup> Cir. 2006); *see, also*, Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919 at 923-924, 231 P.3d 1252 (2010), *citing Thomson* with approval.

In this case, there are actually multiple bases on which Respondents, as non-signatories, could be compelled to arbitrate. The first is estoppel. As the Court in Smith/Enron Cogeneration v. Smith Cogeneration, 198 F.3d 88, 97-98 (2<sup>d</sup> Cir. 1999), explained:

In Thomson-CSF we set forth two types of estoppel cases. 64 F.3d at 778-779. The more typical case, as we have already noted, arises when a signatory to an arbitration agreement seeks to bind a non-signatory to it. We have held that the non-signatory may be compelled to arbitrate when it has derived other benefits under the agreement containing the arbitration clause.

In other words, the non-signatory is estopped from asserting that it is not bound by the arbitration provision where the non-signatory has derived benefit from the contract containing the provision.

Second, Appellant has asserted a claim of piercing the corporate veil of the entities owned and controlled by William Quigg and Patrick Quigg (collectively “the Quiggs”), which entities are the signatories to the Grays Harbor Limited Partnership (hereafter “LP”) Amended and Restated Limited Partnership Agreement (the “LP Agreement”) and the LLC Operating Agreement. A veil piercing/alter ego theory has been recognized both by Federal and State Courts as a basis for compelling a non-signatory to arbitrate. *Comer v. Micor, Inc.*, 436 F.3d 1098 (9<sup>th</sup> Cir. 2006); *see, also, Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919 at 923-924, 231 P.3d 1252 (2010), *citing Thomson* with approval.

Third, corporate officers have been regularly held to arbitration provisions to which they are not personally parties. *See, e.g., Wasserstein v. Kovatch*, 261 N.J. Super. 277, 618 A.2d 886 (App. Div. 1993), *certification denied*, 133 N.J. 440, 627 A.2d 1145 (1993).

[T]he claims are all subsumed in the contract dispute and, hence are subject to the arbitration as required by that contract. Thus the individual defendants in the fraud action are entitled to arbitration as agents of [the contractor] even though they had not individually signed an arbitration agreement. All claims against the non-signatory defendants stemmed from their actions relating to or arising out of the performances of the contract by [the contractor]. Non-signatories of an arbitration agreement may be bound by the agreement under contract and agency principles. A contrary view would only subvert the policy of favoring arbitration and allow an avoidance of an agreement to

arbitrate merely by naming the principals of the corporation or non-signatory parties in a complaint.

However, the threshold issue here is, once again, whether the determination that Respondents are bound to arbitrate should be resolved by the Trial Court or the Arbitrator. In the case of each theory on which Appellant contends Respondents can be compelled to arbitrate, however, a determination of whether the specific theory is applicable would require the Trial Court to examine the course of performance of the various agreements and the course of dealing between the parties over the lifetime of LP and LLC. In other words, and according to Respondents, to determine whether a matter is arbitrable would require the Trial Court to litigate the underlying dispute to conclusion.

This is exactly the opposite of what is contemplated by Wiley and its progeny:

The Court held in Wiley that because procedural questions are often inextricably bound up with the merits of the dispute, they should also be decided by the arbitrator. Secondly, the adjudication of procedural questions by the courts would needlessly delay the resolution of the dispute. Thus the court's role is limited to determining whether the parties submitted the "subject matter" of a particular dispute to arbitration. If so, then any attendant procedural issues are for the arbitrator as well. Id. at 557, 84 S.Ct. at 918.

Dernhardt v. Trailways, Inc., 767 F.2d 687 at 690 (10<sup>th</sup> Cir. 1985).

So, what Respondents are espousing here would have exactly the opposite effect from what arbitration is supposed to accomplish. Rather than providing a cheaper, quicker alternative forum, applying the rule

espoused by Respondents would simply make the whole arbitration process protracted, duplicative and significantly more expensive.

Because the issue of whether Respondents can be compelled to arbitrate is inextricably linked to the substantive issues to be arbitrated, this issue is an issue for the Arbitrator. Moreover, because the standing issue is unquestionably an issue for the Arbitrator, the Trial Court here never should have addressed the issue. Nevertheless, the Trial Court simply got the issue wrong.

**B. The Claims Issue.**

At pages 6 through 9 of Respondents' Brief, Respondents explain how any claims by LLC arising from Respondents' allegedly wrongful conduct now belong to U.S. Bank. As a preliminary issue, why do Respondents themselves have standing to assert that Appellant is precluded from asserting these claims? By Respondents own admission, under their theory of the case, the property interest Appellant is allegedly interfering with does not belong to Respondents. Respondents offer no explanation whatsoever as to why Respondents have any right to object.

In asserting that Appellant could have no claims which are not derivative from LLC, Respondents ignore the clear distinction in both the limited liability statute and the limited partnership statute between claims belonging to the entity against third parties that can be asserted derivatively and claims which can be asserted by a member or limited partner against another member or partner. Both statutes contain provisions specifying the circumstances under which a limited partner or member of a limited liability company can assert claims of the limited partnership

(RCW 25.10.706) or limited liability company (RCW 25.15.370) derivatively. Both statutes separately contain provisions specifying the circumstances under which the conduct of a member or partner will be actionable by other members (RCW 25.15.155) or partners (RCW 25.10.441). This Court cannot conclude that a member of a limited liability company has no claims against another member under the circumstances specified in RCW 25.15.155 without literally re-writing the statute.

The case law, likewise, clearly distinguishes between claims of the entity against third parties, which can be asserted only as derivative claims by a member/partner except under exceptional circumstances; Finlay v. Takasaki, 2006 WL 1169794 (USDC 2006), from claims of breach of duty which a member partner can assert against another member/partner; Bishop of Victoria Corp. Sole v. Corporate Business Park LLC, 138 Wn. App. 443 (2007). So, there are two sets of distinct claims here one of which belongs to the entity and one of which belongs to the member/partner distinguished by, among other things, the nature of the defendant. In the case of the entity claim, the defendant would be a third party. In the case of the member/partner, the defendant would be another member or partner.

Respondents spend page after page discussing the LLC Receivership and the Receivership Statute and the analysis would be appropriate if what we were talking about here was the claims LLC could assert to recover funds siphoned out of LLC by the various entities controlled by the Quiggs. But, that is not what is at issue here. Appellant is not seeking to recover funds siphoned out of LLC by Respondents – Appellant

is seeking to recover the loss of its investment resulting from the Respondents' breach of duties defined to be actionable in RCW 25.15.155 and RCW 25.10.441.

Respondents' arguments under the Receivership Statute (RCW 7.60 Chap.) likewise fail for the very simple reason that Appellant's claims were never property of any receivership estate, and the LLC Receivership Court never acquired jurisdiction over Appellant's claims. Receivership proceedings are generally recognized as proceedings *in rem*. See, e.g., Blackhawk Heating & Plumbing, Inc. v. Geeslin, 530 F.2d 154 at 158 (7<sup>th</sup> Cir. 1976), and Barton v. Barbour, 104 U.S. 126, 136, 26 L.Ed. 672 (1881). Part of the rationale underlying Barton is that the Court appointing the receiver has *in rem* jurisdiction over the receivership property. *Id.* at 136. Under RCW 7.60.005(3), a receiver administers an "estate" defined as:

"Estate" means the entirety of the property with respect to which a receiver's appointment applies, but does not include trust fund taxes or property of an individual person exempt from execution under the laws of this state.

Property is defined in RCW 7.60.005(9) as:

"Property" includes all right, title, and interests, both legal and equitable, and including any community property interest, in or with respect to any property of a person with respect to which a receiver is appointed, regardless of the manner by which the property has been or is acquired. "Property" includes any proceeds, products, offspring, rents, or profits of or from property in the estate.

However, it has been the law in this state since the early part of the last century that a receiver acquires no greater interest in property than that held by the person or entity which is the subject of the receiver's appointment. McGill v. Brown, 72 Wash. 514 at 516, 130 P. 1142 (1913).

Indeed, if the LLC Receiver wanted to establish his ownership of Appellant's claims, Washington law would have required the LLC Receiver to initiate an action asserting his ownership:

It is true, as the petitioner states in his argument, that a court is reluctant to take possession, by its receiver, of property in the possession of third parties claiming title thereto; and ordinarily a receiver who claims such property must institute a separate action. State ex rel. Hunt v. Superior Court, 8 Wash. 210, 35 P. 1087, 25 L.R.A. 354; High on Receivers, 4th ed., § 145; 75 C.J.S. Receivers § 124.

Gloyd v. Rutherford, 62 Wn.2d 59 at 61, 380 P. 867 (1963).

Litigation by a receiver is governed by RCW 7.60.160. In order for the LLC Receiver to assert a claim that the property Appellant claims as its own is actually part of the LLC Receivership Estate, the LLC Receiver would have been required to initiate an adjunct action, including original service of process on Appellant. While a Notice of Appearance was made by Appellant in the Receivership (*CP 375-377*), the Notice specifically excludes service of original process on counsel.

Simply put, the LLC Receivership Court never acquired jurisdiction over either the property at issue here or Appellant. Respondents cite American Linen Supply Company v. Nursing Home Building Corporation, 15 Wn. App. 757, 551 P.2d 1038 (1976), for the proposition that that Appellant can be collaterally estopped by an Order approving a receiver's final report. Under this very authority, however, Appellant cannot be collaterally estopped by an Order that was entered without competent jurisdiction over either the property or Appellant because "competent jurisdiction" is an essential element of the estoppel at 766-767:

The doctrine of collateral estoppel by judgment precludes parties or their privies from relitigating an issue which has been finally determined by a court of competent jurisdiction after the party against whom the estoppel is claimed has had the opportunity to fairly and fully present that party's case.

If, as is clearly the case, the claims asserted by Appellant are the property of Appellant and not LLC, those claims never became part of the LLC Receivership Estate, were not subject to the jurisdiction of the LLC Receivership Court, and were not subject to administration by the LLC Receiver. The failure of the LLC Receiver to obtain jurisdiction by initiating an action to resolve ownership of the claims bars the LLC Receiver and any successor-in-interest from asserting an estoppel.

**C. Respondents' Motion to Strike.**

Respondents' Motion to Strike before the Trial Court (*CP 430-437*) was based on a misapprehension of what is at issue in a Motion to Compel Arbitration under the FAA. As Respondents concede, the scope of inquiry of a Trial Court considering a Motion to Compel Arbitration under the FAA is quite narrow. Once the existence of a valid arbitration agreement is established, the party seeking to compel arbitration need only show that the subject matter of the dispute falls within the scope of the arbitration agreement. The inquiry by the Trial Court on a Motion to Compel Arbitration under the FAA does not extend to the merits of the claims in dispute, and does not go to whether the party seeking to compel arbitration can prove the claims asserted to be subject to arbitration.

Thus, the purpose for considering the allegations of Appellant's Dispute Notice (*CP 200-210*) is to determine the subject matter of the

dispute. In this context, it literally does not matter whether the allegations are true or not. To the extent the Trial Court was considering the allegations of the Dispute Notice for any other purpose, including an assessment of the merits of the claims, the Trial Court was acting outside the bounds of its authority on a Motion to Compel Arbitration under the FAA. The Trial Court's ruling was clearly erroneous.

### III. CONCLUSION

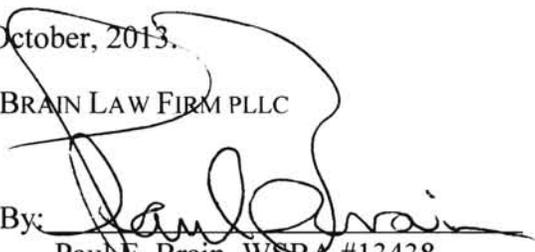
The fact of the matter is that the Trial Court here went way beyond what a Trial Court is authorized to do in determining whether a matter should go to arbitration under the FAA. Both the standing issue and the issue of whether Respondents, as non-signatories, could be compelled to arbitrate are issues which should have been left to the arbitrator to resolve.

Accordingly, this matter should be remanded to the Trial Court with instruction to vacate the Trial Court's prior Orders and, to enter an Order Compelling Arbitration.

DATED this 18th day of October, 2013.

BRAIN LAW FIRM PLLC

By:

  
Paul E. Brain, WSBA #13438

Counsel for Appellant

**CERTIFICATE OF SERVICE**

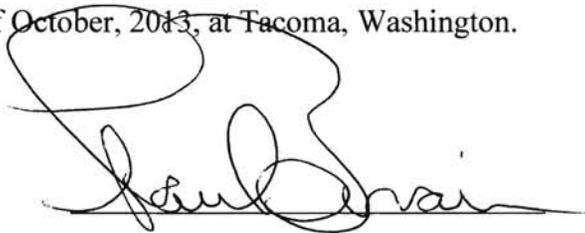
I hereby certify that I have t his 18th day of October, 2013, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

***Counsel for Respondents***

John M. Kreutzer	<input checked="" type="checkbox"/> Hand Delivery
Brian K. Weeks	<input type="checkbox"/> U.S. Mail (first-class, postage prepaid)
Smith Freed & Eberhard P.C.	<input type="checkbox"/> Facsimile
111 SW Fifth Avenue, Suite 4300	<input type="checkbox"/> Email
Portland, OR 97204	

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of October, 2013, at Tacoma, Washington.



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STATE OF WASHINGTON  
COURT OF APPEALS  
TACOMA